THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0810152

Patricia Fore, Employee,.....Appellant,

v.

Griffco of Wampee, Inc., Employer, and
Chartis Claims, Inc., Carrier. .....Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant/Claimant Patricia Fore sustained a work-related injury to her lower back on February 21, 2008, when she "bumped into a meat saw while carrying approximately 60 pounds of meat." (Commission Order, dated October 13, 2009, p. 10) ("2009 Order").[1] At the time of her accident, Claimant was working for Griffco of Wampee, Inc., which carried workers compensation coverage through Commerce & Industry Insurance Company, c/o Chartis Claims, Inc. ("Carrier") (collectively "Respondents").

After some initial treatment, Claimant began treating with Dr. Mark A. Wolgin and Orthopaedic Associates in Albany, Georgia. (APA 2 pp. 21-78) (Transcript of September 27, 2011 Hearing ("Tr.") 18, line 24 – 19, line 1).[2] On April 17, 2009, Dr. Wolgin opined that Claimant's "problem was due to her back, not due to her hip." (APA 2 p. 21). Based on her continued complaints, Dr. Wolgin recommended consideration of a one or two level fusion surgery. (APA 2 p. 22). Dr. Wolgin ordered additional MRI imaging, (APA 2 p. 23), and recommended that Claimant undergo a two-level transforaminal lumbar interbody fusion, to which Claimant agreed. (APA 2 p. 26). During this time, Claimant was not working but, instead was receiving Temporary Total Disability ("TTD") payments from Respondents. (2009 Order, pp. 11-12, 14).

Claimant underwent an L4-5, L5-S1 transforaminal lumbar interbody fusion on May 19, 2010, (APA 2 pp. 38-40), after which she noted some improvement of her leg complaints. (APA 2 pp. 42, 44). However, she continued to be written out of work during recovery from the

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[1] In 2009, the South Carolina Workers' Compensation Commission ("Commission") found that "Claimant suffered compensable injuries to her back and right hip. Her back injury affects her right leg." (2009 Order, p. 11).

[2] Claimant moved to Georgia following her February 2008 injury. (Tr. 18, lines 12-14). At the time of the hearing, Claimant was 46 years old, married, with two dependent children. She had obtained her G.E.D. as well as an Associates' Degree in Business Management. (Tr. 16, line 16 – 17, line 7).

surgery. (APA 2 pp. 47, 53) (APA 2 p. 53). On August 27, 2010, Dr. Wolgin noted gradual improvement and advised Claimant that, "she could do limited work if available, mainly sedentary work with the avoidance of bending, lifting or twisting and a 5-10 pound weightlifting limit." (APA 2 p. 57) (Tr. 20, line 23 – 21, line 1).

Claimant testified that she attempted to do light-duty work with Steve McGowan at ABC Express Bail Bonds ("ABC Bail Bonds") during the summer of 2010 and worked 20 or more hours per week, (Tr. 21, line 11 – 22, line, 6), despite Dr. Wolgin's recommendation that she only work three hours a day, three days a week. (Tr. 57, lines 5-23). Claimant purportedly listed the days and hours she worked for ABC Bail Bonds on a calendar. (Tr. 22, line 20 – 26, line 1). Mr. McGowan, owner of ABC Bail Bonds, testified that he employed Claimant for about six months. (Tr. 70, lines 5-16). Although Claimant initially just worked on computers, Mr. McGowan explained that she wanted to work more and more hours. (Tr. 73, line 20 – 75, line 6). She went to Atlanta to receive her certification as a bail bondsman in late-August 2010. (Tr. 74, line 22 – 76, line 17) (Tr. 50, line 13 – 51, line 5).[3] She began working about 10 hours a week but eventually was working 30-35 hours per week, and sometimes over 40 if she worked on a weekend. (Tr. 79, lines 5-14). Claimant testified that, during the time she worked for ABC Bail Bonds, she also worked for ASAP Towing, Steve McGowan's other business. (Tr. 54, lines 3-15) (*see also* Exh. 6). Although Claimant testified she worked twenty hours a week for ABC Bail Bonds during September 2010, (Tr. 57, lines 5-8), Dr. Wolgin's September 30, 2010, medical notes indicate, "she is able to continue with her work which is three hours per day three days a week." (APA 2 at 61).

As of October 19, 2010, Claimant had been through a month of physical therapy with

[3] Mr. McGowan also indicated that he paid her under the table and under her husband's name because she requested it that way. (Tr. 78, lines 16-24).

little benefit and reported an increase in her hip and back pain due to sleeping in a bed. Repeat injections completely relieved the hip pain and partially relieved the back. (APA 2 p. 64). Seven days later a prescription note from Dr. Wolgin was prepared, writing her back out of work. (APA 2 p. 66). On November 23, 2010, Dr. Wolgin's notes reflect Claimant reported slow improvement, increased walking ability, and little to no leg pain or numbness. (APA 2 p. 67). Nonetheless, Claimant testified that, by November 30, 2010, her pain was aggravated by the several months of work and that she requested additional medications from Dr. Wolgin, which were denied. (Tr. 26, lines 2-24).[4] According to Dr. Wolgin's notes, sometime prior to December 21, 2010, Claimant began taking care of a 3-year old and began engaging in frequent bending, lifting, and twisting. (APA 2 p. 70).

Claimant stopped working for ABC Bail Bonds on January 21, 2011 because she said she was "hurting too bad." (Tr. 27, line 25 – 28, 3). Mr. McGowan stated that, although he knew Claimant had back pain and stiffness "every now and then," (Tr. 83, lines 9-15), Claimant left his employment because she wanted more money. (Tr. 76, lines 18-20) (Tr. 77, line 20 – 78, line 11).

A CT scan on February 9, 2011 showed no evidence of hardware failure but did show evidence of non-union in places. (APA 2 at 72-76) (Tr. 19, line 25 – 20, line 4).[5] As of February 14, 2011, Claimant stated that she felt about the same in the right buttocks area, but did report relief of her prior leg complaints. She told Dr. Wolgin that, because the prior surgery had been painful and because she was taking care of a toddler, she did not wish to undergo additional surgery.[6] Dr. Wolgin noted that, "the patient feels that she would like to go ahead and close her

[4] Note that Dr. Wolgin refilled Claimant's prescriptions in November and December, 2010, and stated on both occasions she continued to be written out of work until further notice. (APA 2 pp. 67, 70).
[5] Claimant testified that the surgery did resolve the sciatic nerve pain. (Tr. 19, lines 6-7).
[6] Although Claimant alleges she suffered from "failed back syndrome," and that the second surgery was estimated to

case." (APA 2 p. 76). Claimant was placed at Maximum Medical Improvement ("MMI") and released from care with a 36% impairment rating using the AMA Guides, 5th Edition. Claimant reported that she continued to care for a toddler full time. Dr. Wolgin continued to write Claimant out of work "until further notice." (Tr. 28, lines 4-15) (APA 2 p. 76-78).

Mr. McGowan testified that, after she quit working for him, he observed Claimant working for another bail bond company, performing duties at the jailhouse bonding an individual from jail. (Tr. 79, line 15 – 81, line 18). Claimant testified that she was approached by Tony Owens with A-1 Bail Bonds, a competitor to her prior employer, about changing her license to its business, placing advertising on her truck, and using her name for marketing purposes. She alleged that she completed one bond in February 2011 to change the license but did no other work and received no payment. She alleged that she helped Mr. Owens because he had problems with his back and heart. According to her testimony, Claimant entered bonds and advertised for A-1 Bail Bonds without compensation.

> Q: So, the help that you are giving Tony for free is the same thing you were getting paid for at ABC bonds, correct?
> A: Correct.

(Tr. 49, lines 6-9). Claimant testified she began doing more bonds in July, August, and September 2011, and eventually was reported by her former employer. (Tr. 28, line 16 – 34, line 11) (Tr. 35, line 22 – 36, line 10). Claimant explained that she arranged for Mary Weaver to work at A-1 Bail Bonds so that she would not have to get up at all hours of the night. (Tr. 34, line 15 – 35, line 14).

Although Claimant testified that she was not employed, (Tr. 34, lines 21-22), she

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have only a 50% chance of success, (App. Br. pp. 6-7), Dr. Wolgin's final medical report reflects neither of these alleged findings. (APA 2 p. 76). The only evidence of the "fifty/fifty" chance of success of a second surgery came from Claimant herself, (Tr. 20, lines 14-19), who is not a trained medical professional. Furthermore, Dr. Wolgin simply said Claimant "felt" she was not able to consider a second surgery because the first surgery was painful and

admitted on cross-examination that she performed the same work for A-1 Bail Bonds ***for free*** as she had been paid by ABC Bail Bonds to perform. (Tr. 48, line 17 – 49, line 9). In fact, the work she was doing for A-1 Bail Bonds for free was the same work Mary Weaver was being paid for. (Tr. 60, lines 5-25). She also admitted at the hearing that, although she stated in her deposition that she had not earned any money since her back surgery that was not true. (Tr. 36, line 19 – 37, line 10). She also testified regarding an entry on her Facebook page indicating she was "Self Employed and Loving It!" as a bondsman and "bond you out of jail if you need me call me." (Tr. 37, lines 11-24) (Exh. 7).

Claimant testified she took a stalking order out against her former employer, Mr. McGowan, because she was aware he was investigating the work she was doing for his competitor. (Tr. 39, line 18 – 42, line 1). On cross-examination, she admitted that the order prohibited her from contacting Mr. McGowan as well. (Tr. 61, lines 17-25).

Claimant admitted that, at her deposition, her response to whether she was working was "no" but at the Hearing she answered the same question "yes." (Tr. 53, lines 9-12). Claimant was asked why she had not admitted she was working for A-1 Bail Bonds when her deposition was taken in August 2011. (Tr. 49, line 10 – 50, line 12). Her response was that, although she had performed numerous bonds between February and September 2011, she did not consider it "work." (Tr. 50, lines 3-7).

She also testified at her deposition that she had no further education or certification since prior deposition. However, she admitted at the Hearing that she received certification as a bail bondsman in August 2010, and also admitted that she received a diploma in accounting in 2010 that she did not previously report. (Tr. 50, line 13 – 53, line 16).

Although Claimant testified that she could not "get up and down, bend over, come up and

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because she was taking care of a toddler. (APA 2 p. 76).

down or do any kind of side twisting up and down," repetitively, (Tr. 55, lines 1-16), she attempted to explain away the fact that surveillance footage showed her squatting down to pick things off the lower shelf in a Wal-Mart store by saying it depended on the weight of the item she was picking up. (Tr. 55, line 17 – 56, line 22). Claimant would not confirm or deny that she could repetitively bend based on footage of her bending to pick up items from the bottom shelf at Wal-Mart. Eventually, she admitted she could pick up light things. (Tr. 55, line 17 – 57, line 4). In fact, Claimant admitted that she could work as long as there was not repetitive bending and twisting involved. (Tr. 55, lines 1-5) (Tr. 56, line 23 – 57, line 1).

Claimant filed a Form 50 seeking compensation for injury to her right hip, back and right leg. She claimed permanent and total disability and sought lifetime medical treatment and an award paid in lump sum with James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010) language. On her Form 50, Claimant alleged she had not worked since the February 2008 accident. (Claimant's Form 50, dated June 27, 2011).

Respondents filed a Form 51, acknowledging the February 2008 accident and injury to Claimant's hip and back but denying any other injury. Respondents asserted Claimant was at MMI and denied that she was permanently and totally disabled. (Respondents' Form 51, dated July 27, 2011).

Claimant's Attorney referred her to Glen Adams for a vocational assessment on September 12, 2011. (APA 7 pp. 96-106). Mr. Adams' notes reflect that she told him, "[s]he can get on the floor, but getting back up is a problem. She has to use furniture to get back up." (APA 7, p. 98). Mr. Adams' report reflects that she only told him she had worked for ABC Bail Bonds in January 2011, "entering bonds into the computer." She also told him she only "worked a day or two per week. She worked two hours per day up to 4-5 hours in a day. She believes she

was averaging about 12 hours per week." (APA 7 p. 98). Based in large part on her statements to him, Mr. Adams found Claimant totally disabled. (APA 7 p. 106). However, she admitted at the Hearing that she did not accurately report to Mr. Adams how much she was working. (Tr. 58, lines 4 – 59, line 24).

In her Pre-Hearing Brief to the Commission, Claimant admitted she had "attempted to work as a clerk for ABC Bail Bonds in late 2010," but stated that she only "averaged about 12 hours per week." (Claimant's Pre-Hearing Brief, dated September 12, 2011, p. 1 of 3). She alleged she was permanently and totally disabled as a result of injury to two body parts under S.C. Ann. § 42-9-10, or based on greater than fifty percent disability to the back under S.C. Code Ann. § 42-9-30, that she was entitled to additional medical treatment and sought a lump sum payment and lifetime proration. (Claimant's Pre-Hearing Brief). Respondents again denied that Claimant was entitled to permanent and total disability, but maintained she had reached MMI and that they were entitled to a credit for overpayment of benefits for the periods when she was employed. Respondents questioned Claimant's credibility and noticed her former employer, Mr. McGowan, and presented various exhibits related to her work for ABC Bail Bonds and A-1 Bail Bonds, as well as correspondence and a surveillance video. (Respondents' Pre-Hearing Brief, dated September 19, 2011) (Respondents' Amended Pre-Hearing Brief, dated September 23, 2011).

The case was heard by Single Commissioner G. Bryan Lyndon on September 27, 2011. Claimant objected to Respondents' Exhibit No. 1, which consisted of two letters. The first was a July 20, 2011 letter from the Assistant Deputy Attorney General's office to the Special Investigative Unit of the Carrier, and the second was a July 18, 2011 letter from Mr. Gary Smith, the Director of the Compliance Division of the Commission, to the Attorney General's Insurance

Fraud Division. Claimant argued that, as a result of these two letters being in the file, the entire Commission had to recuse itself from hearing this case. The Single Commissioner excluded the July 20, 2011 letter but denied the rest of Claimant's motion. (Tr. 4, line 22 – 10, line 20) (Exh. 1).[7] Claimant requested to call Tony Lee Owens. Respondents' objection to this testimony based on late notice was granted and the testimony was taken as Proffered Testimony outside of the presence of the Commission and is not part of the record. (Tr. 65, line 3 – 67, line 22). Respondents asserted, among other things, that Claimant could work, very possibly was still working and requested the Single Commissioner to make a credibility determination. (Tr. 14, line 15 – 15, line 20).

The Single Commissioner noted the numerous discrepancies in Claimant's testimony regarding her work and self-reported physical limitations. (Single Commissioner Decision and Order, January 18, 2012, pp. 12-13). After considering all of the evidence in the record, the Single Commissioner found Claimant was not a credible witness but awarded her 40% Permanent Partial Disability to her back, pursuant to S.C. Code Ann. § 42-90-30, as well as lifetime replacement of any hardware. (Id. pp. 13-14). The Single Commissioner also awarded Respondents credit for all wages paid to Claimant during the disability period and for TTD paid following the determination Claimant was at MMI on February 14, 2011. (Id. p. 14).

Claimant filed a Form 30 request for Commission review raising 17 issues. Respondents filed a Brief,[8] and the Full Commission heard argument on June 18, 2012 and issued its decision on August 27, 2012 affirming the Single Commissioner, and modifying the order to address Claimant's allegations regarding *ex parte* contact, whether the Commission relied on the

[7] Claimant also objected to both a surveillance video of Claimant and an accompanying written report. The Commissioner excluded the written report, but included the surveillance video in the record. (Exh. 3) (Tr. 10, line 22 – 12, line 18).

[8] Respondents' Brief to the South Carolina Workers' Compensation Commission, dated April 26, 2012.

correspondence to and from the Attorney General's office, and Claimant's request that the entire Commission recuse itself and whether Claimant received a fair and impartial hearing. (Decision & Order of the Full Commission, August 27, 2012, pp. 9-14) ("Commission Decision").

Claimant timely appealed to this Court.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. §1-23-380(A)(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). It is not within the appellate courts' purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). The Commission is the final arbiter of witness credibility and the weight to be accorded to evidence. Brunson v. American Koyo Bearings, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E2d 526, 528 (2001). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

ARGUMENTS

I. The Commission correctly determined there was no *ex parte* communication in this case.

A number of Claimant's arguments rely on her allegation that an impermissible *ex parte* contact occurred in this case. (*See* Appellant's Statement of Issues on Appeal, Nos. 1, 2, 3, 4, 5, and 10). Although she characterizes the alleged *ex parte* contact in various ways, the Commission correctly held that there was no *ex parte* contact. This finding disposes of those arguments that are dependent on or assume the presence of an impermissible *ex parte* contact.

Claimant bases her allegations of *ex parte* contact on the following facts: On July 6, 2011, Mr. McGowan called the Commission to report that insurance fraud was being committed by Claimant and her new employer, A-1 Bail Bonds.[9] On July 18, 2011, Mr. Gary Smith,

[9] Claimant makes much of the fact that, at the hearing, Mr. McGowan could not recall exactly who he called. (App.

Director of the Commission's Compliance Division, forwarded the information to the Attorney General's Insurance Fraud Division, pursuant to Section 38-55-570. (Exh. 1 ("July 18 Letter")). Mr. Smith suggested that the workers' compensation carrier might need to know about the fraud allegation so that it could conduct its own investigation, and provided the Attorney General's office with contact information for the Carrier. Whether the information was forwarded to the Carrier was entirely up to the Attorney General's office. (Exh. 1).[10] At the time he called the Commission, Mr. McGowan was not designated as a witness in this case but later was identified on Respondents' Form 58 Pre-Hearing Brief.

According to Black's Law Dictionary, *ex parte* communication is defined as "prohibited communication between counsel and the court when opposing counsel is not present." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003). At no time did Respondents or Respondents' counsel communicate with the Commission without copying Claimant's counsel. Instead, the communications complained of here consisted of: 1) a communication between a non-party and a non-adjudicative arm of the Commission, the Compliance Division; 2) a communication between the Commission's Compliance Division and the Attorney General's office; and 3) a communication between the Attorney General's office and the Carrier. None of these communications involved the hearing Commissioners or their staff, and none constitute an *ex parte* contact.

First, Claimant alleges that "Garry Smith, the Director of the Commission's Compliance Division, received *ex parte* communication from a potential material witness (Steve McGowan) in the case." (App. Br. p. 13). This is not an *ex parte* contact for the simple reasons that Mr.

Br. p. 8 n.1). This is not particularly relevant as Exhibit 1 clearly states that Mr. McGowan called the Commission. Furthermore, if Mr. McGowan had just called A.I.G., as opposed to the Commission, it is highly unlikely that Claimant would be raising any allegations of *ex parte* contact.

[10] As noted previously, upon Claimant's motion, the July 20 letter from the Attorney General's office to the Carrier

McGowan is not and never has been a party in this case.[11] Nor had he been designated as a witness: Mr. McGowan's July 6, 2011 contact with the Commission was made unbeknownst to Respondents, and Respondents had had no prior contact whatsoever with him. Finally, Mr. McGowan's contact with the Commission was to the Compliance Division, not with any of the hearing Commissioners.

Second, Claimant alleges an improper *ex parte* communication occurred when Mr. Smith sent the July 18 Letter to the Attorney General's Insurance Fraud Division. (App. Br. p. 13, n.6). This is clearly not *ex parte* communication because it is not between a Commissioner and a party, but rather between the head of the Commission's Compliance Division and the Attorney General's office, which is not and has never been, a party to this case. Mr. Smith forwarded the information only to the Attorney General's Insurance Fraud Division as required by S.C. Code Ann. §§ 38-55-570(A) and 42-9-440. As is stated in the July 18 Letter, neither Mr. Smith nor anyone else at the Commission forwarded this information directly to the Carrier. Furthermore, contrary to Claimant's allegations, neither Section 38-55-570(A) nor Section 42-9-440 require the Commission to inform *either* party of a report of fraud. Therefore, Claimant's assertion that the communication between Mr. Smith and Attorney General was improper is just plain incorrect.

Finally, Claimant suggests that the July 20, 2011 letter from the Assistant Deputy Attorney General, Heather Weiss, to the Special Investigative Unit for the Carrier constituted an impermissible *ex parte* communication. (App. Br. p. 13). This theory is based, in part, on Claimant's assertion that Mr. Smith "instructed" the Attorney General's office to forward the

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was stricken from the record. (Tr. 4, line 22 – 5, line 21).

[11]Although, Claimant's counsel admitted at the hearing before the Full Commission that "[t]he problem is not the communication between the Commission and Mr. McGowan," (Transcript of June 18, 2012 Hearing Before the Appellate Panel of the Full Commission ("Comm'n Tr.") 28, lines 24-25) (Comm'n Tr. 35, lines 22-24), she seems

July 18 Letter to the carrier, and that the Attorney General's office complied with those "instructions." (App. Br. p. 9). This communication does not constitute an *ex parte* contact, as the Attorney General's office is neither an adjudicator in this proceeding, nor is it answerable to or required to take "instruction" from the Commission. *See* (Comm'n Tr." 32, line 20 – 33, line 1). Claimant has produced no evidence otherwise, and thus her assertions that the Commission sent the communication to Respondents "via the Attorney General's office," are entirely inaccurate and unsupported. (Comm'n Tr. p. 37, lines 12-13).[12]

Claimant alleges unfair prejudice in that she was not notified of the Attorney General's investigation at the same time the Carrier was notified. This is immaterial to an analysis of *ex parte* communication because, as noted above, the Attorney General's office is not the judicial body determining Claimant's claim. The Attorney General forwarded the complaint to the Carrier as it is entitled to do under S.C. Code Ann. § 38-55-570(B) (allowing the Attorney General to request investigative materials from an insurer). Naturally, the Attorney General would want to contact an insurer to assist with its investigation into a fraud complaint. Conversely, it would be against the Attorney General's interest to notify a claimant of an investigation before it begins and there is no requirement compelling the Attorney General to do so.

Tellingly, Claimant admits that there are no other South Carolina cases dealing with these same facts. This is because all of the relevant cases deal with an *ex parte* contact by a party/participant and the adjudicator . In fact, Section 1-23-360, on which Claimant relies, specifically only applies to "members or employees of an agency assigned to render a decision or

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to have reversed her position on appeal.

[12] Furthermore, it is entirely logical to read this portion of the July 18 Letter as recognizing the Attorney General's interest in engaging the assistance of the Carrier in performing its fraud investigation, and advising the Attorney General of the Commission's limitation in that respect. In fact, the July 18 Letter is careful to not overstep the

to make findings of fact and conclusions of law in a contested case," or, in other words, adjudicators. Section 1-23-360 provides that a Commission adjudicator "shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate." S.C. Code Ann. § 1-23-360.

Regardless of how Claimant attempts to twist the facts of this case, the bottom line is that no hearing Commissioner (or their staff) had any *ex parte* communication with any party, their counsel, or witness, designated or otherwise. Although Claimant attempts to argue that Mr. Smith was part of the hearing Commissioners' "staff" and thereby subject to the prohibition discussed in Canon 3B(7), Rule 501, SCACR, the head of the Commission's Compliance Division is hardly part of the hearing Commissioners' staff. (Comm'n Tr. 27, lines 16-19) (Comm'n Tr. 29, lines 12-14) (Comm'n Tr. 31, lines 4-6) (Comm'n Tr. 37, line 22 – 38, line 1). The Commission has an "administrative" department and a "judicial" department. *See* S.C. Code Ann. §§ 42-1-90, 42-3-10.[13] The Compliance Division is part of the administrative department of the Commission, not the judicial department. S.C. Code Ann. § 42-3-90. As noted above, two of the communications complained of here were between the Director of the Compliance Division (part of the administrative side of the Commission, not the adjudicative side), on the one hand, and Mr. McGowan and the Attorney General's office, on the other. Thus, even if the July 6 call and/or the July 18 Letter could somehow be construed as "indirect" communications

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bounds of proper communication. Baseless allegations otherwise should be carefully weighed before impugning the good faith of the Commission and its various Divisions.

[13] Hence, Claimant's claim that the Commission's sole function is to adjudicate workers compensation disputes, (App. Br. p. 18), is also inaccurate. Instead, the administrative department of the Commission is further divided into three divisions: (1) the Division of Coverage and Compliance, (2) the Division of Claims and Statistics, and (3) the Division of Medical Services. S.C. Code Ann. § 42-3-10. Furthermore, there is no absolute bar to an agency, particularly two separate sections of an agency, performing both investigative and adjudicative functions. *See, for example,* Winthrow v. Larkin, 421 U.S.35, 95 S. Ct. 1456 (1975) (holding that simply because an administrative agency both investigates and adjudicates a claim does not prove, absent more, either *ex parte* contact or unfair

between the Commission and a potential witness or the Carrier, which Respondents dispute, neither involved anyone who is part of the adjudicative side of the Commission. Furthermore, there is no evidence that the Single Commissioner, or anyone else in the Commission's adjudicative department, had any knowledge of any of these communications prior to the Hearing.

Although Claimant accuses the Commission of defining *ex parte* communications narrowly, even the cases cited by Claimant employ a definition of *ex parte* contact that is consistent with that applied by the Commission in this case. *See* Ellis v. Procter & Gamble Distr. Co., 315 S.C. 283, 433 S.E.2d 856 (1993) (submission of legal memorandum by one party to the judge without copying opposing counsel was impermissible *ex parte* contact); Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993) (analyzing numerous interactions between the judge and counsel for a party was impermissible *ex parte* contact); PATCO v. Federal Labor Rel. Auth., 685 F.2d 547, 562-63 (D.C. Cir. 1982) (evaluating contacts under a section of the Civil Service Reform Act, which prohibits *ex parte* communications "'relevant to the merits of the proceeding' between an 'interested person' and an agency decisionmaker"); Blaker v. Planning & Zoning Comm'n, 212 Conn. 471, 562 A.2d 1093 (Conn. 1989) (party's submission of additional evidence to zoning commission, after the close of public hearings and without providing other parties notice, was an improper *ex parte* contact); Jennings v. Dade County, 589 So.2d 1337, 1991 Fla. App. LEXIS 7720 (Fla. Ct. App. 1991) (finding impermissible *ex parte* conta ct between a lobbyist for one party and members of the county commission making land use determination). Furthermore, the Commission took its definition straight from Black's Law Dictionary and Brown v. Bi-Lo, which remain good law.

Although Claimant cites Blaker for the proposition that any *ex parte* contact creates a

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hearing process).

presumption of prejudice, she cites no South Carolina case to this effect.[14] In fact, Burgess appears to apply an opposite position, refusing to adopt a rule that all orders resulting from an *ex parte* contact are invalid "absent a finding of partiality or prejudice in [the] record." 311 S.C. at 331, 428 S.E.2d at 884; *see also* Ellis, 315 S.C. at 285, 433 S.E.2d at 857 (finding evidence of judicial prejudice where the record did "not support the trial judge's factual finding on the merits"). In any event, there was no *ex parte* contact by any party or any witness in this case with any hearing Commissioner or their staff. Furthermore, even if Claimant had somehow proven an *ex parte* contact had occurred, which Respondents deny, she cannot prove it was prejudicial because the Commission's Decision is entirely supported by other evidence in the record.

Claimant's due process rights and entitlement to a fair tribunal have not been violated. Claimant cites Winthrow v. Larkin, 421 U.S.35, 95 S. Ct. 1456 (1975) for the proposition that due process requires a fair tribunal, a precept that applies equally to administrative agencies that adjudicate as well as courts. What Claimant fails to note is that Winthrow examined the issue of administrative agencies that both investigate a claim and then later adjudicate the same claim, and concluded such *ex parte* investigation did not necessarily taint the adjudicative process or raise due process concerns. 421 U.S. at 48-49, 95 S. Ct. at 1465. In fact, the United States Supreme Court explained that:

> The mere exposure to evidence presented in nonadvesary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."

421 U.S.at 55, 95 S. Ct. at 1468.

[14] Note that in Jennings, the Florida appellate court advised that the occurrence of an *ex parte* contact in a "quasi-judicial proceeding does not mandate automatic reversal" but, instead, held that the complaining party also must prove prejudice. 589 So.2d at 1341, 199 Fla. App. LEXIS 7720 *8.

Respondents do not dispute that Commissioners of the South Carolina Workers' Compensation Commission act in a quasi-judicial capacity when they adjudicate workers' compensation claims.[15] However, Respondents assert that Claimant has failed to prove any *ex parte* communication occurred in the first instance, or that she was unfairly prejudiced in any way by the contact she claims was *ex parte*.

Claimant mistakenly alleges that she was unfairly prejudiced because she did not learn until she received Respondents' Pre-Hearing Brief that "'insurance fraud' was even an allegation in this case." (App. Br. p. 14). Insurance fraud was **not** an allegation in this case. The only mention of "fraud" in the record is the July 18, 2011 letter, which is part of the Commission's file, and when Claimant's counsel cross-examined Mr. McGowan. (Tr. 84, line 14 – 86, line 23). Thus, contrary to Claimant's assertions, (App. Br. p. 17), Respondents did not "fully develop" any aspects of the fraud allegations.

Claimant's credibility, however, was a central issue in this case. Where there is a dispute in the facts as presented by opposing sides, "the issue of credibility of the witnesses necessarily must play an important role in a determination of the facts." Klutts Resort Realty, Inc. v. Down-'Round Dev. Corp., 268 S.C. 80, 91, 232 S.E.2d 20, 25-26 (1977). Claimant's credibility was attacked, not on the basis of the fraud investigation but, rather, on the basis of her inconsistent statements, her patently unbelievable fabrications, and surveillance videos. (Tr. 48, line 21 – 62, line 1). Even if (but without conceding) as Claimant argues, admission of the July 18 Letter was impermissible character or "prior bad acts" evidence, it was harmless error at most. "Error is harmless where it could not reasonably have affected the result of the trial." State v. Bryant, 369

[15] The two cases cited by Claimant for this point, Hall v. Marion Sch. Dist. No. 2, 860 F. Supp. 278 (D.S.C. 1993), and Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012), deal with issues of wrongful termination and the preclusive effects of Commission decisions for purposes of res judicata and collateral estoppel and, therefore, do not speak to the substantive issues in this case.

S.C. 511, 518, 633 S.E.2d 152, 156 (2006). In other words, where the record contains ample competent evidence to support the Commission's credibility determination, the admission of the July 18 Letter, even if it was improper (which Respondents do not concede), does not warrant overturning the decision below. Here, the record is replete with evidence that supports the Commission's credibility determination. For example, the Commission noted Claimant first denied but later admitted she had earned money after her back surgery; she testified that she was doing the same work for A-1 Bail Bonds for free that she had done for ABC Bail Bonds, which job she had had just quit because of severe back pain; that she said she was not working for A-1 Bail Bonds but both her vehicle and her Facebook profile advertised her bail bond profession; she testified at her deposition that she had received no training after her injury but later admitted she had taken classes to become a bondsman, as well as in accounting; and that she reported physical limitations that were demonstrably contradicted by surveillance footage of her "squatting, bending and lifting in a manner well-exceeding her self-reported limitations." (Commission Decision, pp. 6-8).

The fact that she did not learn of a potential witness (Mr. McGowan) or evidence (the surveillance tape and the letters) until Respondents' Pre-Hearing Brief does not demonstrate Claimant was treated unfairly before the Commission – informing the opposing side of the evidence and witnesses a party plans to present is precisely the purpose of filing pre-hearing briefs. Section 67-611(B) requires, among other things, that through its Form 58 Pre-Hearing Brief each party, "give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements including video recordings and/or transcribed audio recordings have been taken from one of the witnesses including the claimant and indicate who has possession of same." S.C.

Code Reg. § 67-611(B). That is precisely what Respondents did here. Furthermore, Claimant knew Respondents were challenging her entitlement to permanent and total disability. (Defs' Form 51).

Claimant argues that the Single Commissioner somehow impermissibly relied on extraneous material or documents that were "unknown or unavailable to the parties." (App. Br. p. 16). First, to the extent Claimant is referring to the July 18 Letter, Claimant admitted before the Full Commission that there was no factual finding, conclusion of law or ruling in the Single Commission Decision that relied in any way on that letter. (Comm'n Tr. 39, lines 11-22).[16] Second, the July 18 Letter was identified in Respondents' Pre-Hearing Brief and accepted into the record by the Single Commissioner. Thus, the Commission did not rely in any way on extraneous or non-record material.

Because there was no *ex parte* contact, the Commission did not err by refusing to recuse itself. From time to time, it is expected that the Workers' Compensation Commission will receive reports of fraudulent activity. By law, the Commission must have some function to process these complaints to the Attorney General's office. Mr. Smith's department handles this function and complied with the applicable statutes. "It must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something." Smith v. Barnwell County, 384 S.C. 520, 524, 682 S.E.2d 828, 830 (2009). To accept Claimant's argument would mean that every single time a fraud complaint is lodged with the Commission, the entire Commission would have to recuse itself from any proceedings involving the referenced claimant.

[16] Claimant's reliance on State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000) in this respect is misplaced. First, in Harris, a juror reviewed definitions from Black's Law Dictionary that had not been admitted into the record. Here, the July 18 Letter was not outside of the record but, instead, was admitted into the record. Second, in Harris, the Supreme Court instructed that, "[a] mistrial should only be granted when absolutely necessary. [citation omitted] In order to receive a mistrial, the defendant must show error and resulting prejudice." 340 S.C. at 63, 530 S.E.2d at 628. As noted both above and below, Claimant has not and cannot show any prejudice resulting from the inclusion of the July 18 Letter because the Commission's substantive decision does not rely on the letter and its credibility

This would be an absurd result, and clearly not intended by the legislature. It is well-settled that, "[c]ourts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342-343, 713 S.E.2d 278, 283 (2011), *citing* Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

Even if there had been *ex parte* contact, which Respondents do not concede, the Commission was able to hear and fairly adjudicate this claim. Claimant's allegations that she was not afforded a fair hearing are unfounded and miss the mark. For instance, the ruling in Garris v. Governing Bd. of S.C. Reinsur. Fac., 333 S.C. 432, 511 S.E.2d 48 (1998), was based on the fact that the ultimate adjudicators were "intimately involved in the investigative and prosecutorial processes," such that they formed opinions as to what the final outcome should be, before the actual hearing took place. 333 S.C. at 445, 511 S.E.2d at 55. However, the Court reiterated that "[t]he fact that investigative, prosecutorial, and adjudicative functions are performed within the same agency, or even performed by the same persons within an agency, does not, without more, constitute a violation of due process." 333 S.C. at 443, 511 S.E.2d at 54. In any event, in the instant case there is no evidence whatsoever that any hearing Commissioner at any level participated in the investigation or prosecution of insurance fraud. The quote lifted from Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997) addresses the situation where an adjudicator, "by prior involvement with [the] case, ... has obtained *ex parte* information or had a 'will to win.'" 328 S.C. at 69, 492 S.E.2d at 72. Here, there is no evidence whatsoever that either the Hearing Commissioner or any of the Appellate Panel Commissioners participated in any investigation or prosecution of Claimant, or formed any kind of preconceived "will to win." Contrary to Claimant's suggestions, the Full Commission's added findings of fact

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determination is supported by other substantial and credible evidence in the record.

do not evidence discomfort or partiality. They simply reflect the current state of the law and a rejection of Claimant's fabricated theories of *ex parte* contact. Claimant's attempt to turn this into something that it is not should be roundly rejected.

Because there was no *ex parte* contact, there was no need to exclude the July 18 Letter from the record. Although Claimant argues that evidence of the fraud investigation was barred by Rules 404 and 609, SCRE, the South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission. *See* S.C. Code Ann. § 1-23-330(1) (except in proceedings before the Workers' Compensation Commission, rules of evidence apply in contested matters before an agency); *see also* Hamilton v. Bob Bennett Ford, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000) (explaining that "great liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts"), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1941). Furthermore, the July 18 Letter was not presented as either character evidence or for impeachment purposes. (Tr. 10, lines 2-4 (July 18 Letter was simply evidence of a fraud investigation)). Instead, Claimant demonstrated her own character through her repeated attempts to hide the truth. She was impeached by own testimony.

Finally, Claimant argues that her due process rights were abused because her lead counsel was unavailable to make her direct argument on appeal to the Full Commission. (App. Br. p. 19). This argument is unavailing because she had competent counsel present who made her direct argument. In addition, Mr. Samuels was afforded additional and abundant time in rebuttal to make any points he deemed necessary. (Comm'n Tr. 25, line 7 – 42, line 19). Thus, Claimant was denied no due process rights – she had ample opportunity to argue her case. Furthermore, Counsel for Claimant must have known he had back-to-back arguments scheduled for June 18, 2012 and could have moved to postpone oral argument in this case, *see* S.C. Code Reg. § 67-708,

but failed to do so.

Because there has been no *ex parte* contact in this case, and because Claimant has not been deprived of her due process rights, this Court should affirm the Commission Decision and dismiss her appeal.

II. The Commission properly determined that Claimant is not permanently and totally disabled.

The claimant bears the burden of proving entitlement to benefits under the Act. Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998). Here, Claimant simply failed to meet her burden of proving she was entitled to an award for permanent and total disability under either Section 42-9-10 or 42-9-30. S.C. Code Ann. §§ 42-9-10 & 42-9-30.

A. Claimant is not entitled to permanent and total disability under Section 42-9-30 because the Commission properly held the loss of use of her back was less than 50%.

Claimant argues that she is entitled to permanent and total disability under Section 42-9-30 because the evidence supports a higher disability rating than that awarded by the Commission. However, the Commission's finding that she suffered only a 40% permanent partial disability to her back is supported by substantial evidence in the record and should be upheld. On review, an appellate court's review of a disability finding "is limited to a determination of whether the commission's findings, inferences, conclusion, or decisions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Solomon v. W.B. Easton, Inc., 307 S.C. 518, 520-521, 415 S.E.2d 841, 843 (Ct. App. 1992).

Dr. Wolgin gave Claimant a 36% impairment rating to the whole body. (APA 2 p. 76). This is the only probative medical evidence of her level of impairment. Notably, the Commission's 40% disability rating is higher than Dr. Wolgin's impairment rating.

Claimant argues that she has suffered a greater than 50% loss of the use of her back. (App. Br. p. 31). However, the factfinder in this case – the Commission – specifically found only a 40% loss of use of her back. This finding, in turn, was based on all of the evidence in the record. The Commission found, based on the testimony and exhibits submitted to the Commission, and after considering all of the evidence, that Claimant suffered 40% permanent partial disability to her back. (Commission Decision pp. 6-8, 13).[17]

Claimant focuses on Dr. Wolgin's out of work statements and Mr. Adams' vocational report, and argues that they require a higher disability award. Both Dr. Wolgin's and Mr. Adams' opinions regarding her ability to work, however, were based on false information supplied to them by Claimant herself and are, therefore, of doubtful probative value. Claimant admits that she worked for ABC Bail Bonds from late August 2010 until late January 2011. (App. Br. p. 7). Testimony in the record supports a finding that she worked upwards of 40 hours a week, and sometimes even more. (Tr. 79, lines 5-14) (Tr. 57, lines 5-10). Tellingly, during part of the time she was working steadily for ABC Bail Bonds, Dr. Wolgin's notes state that Claimant is written out of work until further notice. (APA 2 pp. 66, 68, and 71). Dr. Wolgin reported that Claimant told him only that she was working three hours per day, three days per week "helping in an office setting." (APA 2 p. 61). Thus, it is clear that Claimant was not accurately reporting her activities and capabilities to Dr. Wolgin. Furthermore, it is clear that not even Claimant relied on the out of work notes, since she continued to work even when she was "written out of work."

Claimant also lied to Glen Adams during her September 7, 2011 vocational assessment. She reported to Mr. Adams that she worked for only a couple of months, worked a day or two

[17] Because the Commission did not find Claimant suffered a greater than 50% disability to her back, no presumption of total and permanent disability arose in this case and her arguments regarding the same (including any shifting of

per week (2-5 hours per day), and at some point averaged 12 hours per week. (APA 7 p. 98). As noted above, Claimant's own testimony demonstrates that she worked almost double what she reported to Mr. Adams. According to her former employer, Claimant actually worked significantly more hours per week. (Tr. 79, lines 5-14). Thus, the statements in Dr. Wolgin's and Mr. Adams' regarding Claimant's ability to work simply are not probative, since they rely on misinformation fed to them by Claimant.[18]

Because the only medical impairment rating in the record is a total body impairment of only 36% and , as noted above, Dr. Wolgin's statements regarding Claimant's cap acity for employment were based on misinformation, any greater disability would have to be based on Claimant's testimony regarding her condition and limitations which, in turn, depended entirely on her credibility. There is a plethora of evidence in this record demonstrating that Claimant was not a credible witness.[19] As noted above, and as found by the Commission, Claimant has lied repeatedly about her functional capacity and work history. The greater weight and preponderance of the evidence shows that, following surgery, Claimant returned to work for ABC Bail Bonds and has continued to work for subsequent employers. (Commission Decision pp. 6-8).

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the burden of proof to Respondents), (App. Br. pp. 31-32), are irrelevant and should be dismissed.

[18] The Commission's finding that Claimant was not entitled to a greater disability rating does not "impute some sort of credibility finding" onto Dr. Wolgin, as is suggested by Claimant. (App. Br. p. 25). Instead, the Commission's determination recognizes that Dr. Wolgin's "no work" notes and his statement regarding her work capabilities were based on false information that Claimant was reporting to him, juxtaposed against the overwhelming evidence that she continued to work. The same is true for Mr. Adams' conclusions regarding Claimant's ability to work.

[19] Although Claimant attempts to bolster her case by attacking Mr. McGowan's credibility, (App. Br. p. 26), the Commission is the final arbiter of witness credibility and the weight to be accorded to evidence. Brunson, 395 S.C. at 455, 718 S.E.2d at 758. The only witness the Commission found lacked credibility was Claimant herself, and her invitation to this Court to find otherwise should be rejected. Furthermore, Mr. McGowan did not testify to Claimant's medical condition but to her work history with ABC Bail Bonds and what he observed after she voluntarily quit working for him. Thus, Claimant's criticism that he did not know about her "medical condition and limitations," (App. Br. p. 31), is irrelevant. Furthermore, any combativeness on Mr. McGowan's part was elicited by questions from Claimant's counsel. (Tr. 84, lines 9-10 (accusing witness of taking illegal drugs)) (Tr. 85, lines 14-15 (accusing witness of being an accomplice to insurance fraud) (Tr. 87, lines 12-13 (accusing witness of tax fraud)) (Tr. 88, lines 17-18 (badgering witness)) (Tr. 89, lines 15-17 (badgering witness)).

Claimant admitted that she could work, "as long as I don't have to get up and down, bend over, come up and down or do any kind of side twisting up and down... if I've got to bend down and come off the floor with something and use that lower back to bring that weight up, it don't work." (Tr. 55, lines 1-5). However, she informed Dr. Wolgin on December 21, 2010 that she was taking care of a 3-year-old, which required her to bend, lift, and twist frequently. (APA 2 p. 70). Surveillance footage of the Claimant also reveals Claimant repetitively squatting to pick up items from a shelf at Wal-Mart. (Tr. 55, line 17 – 56, line 25) (Exh. 3).

Additional evidence supports the finding that Claimant is not permanently and totally disabled. Respondents obtained surveillance footage which shows Claimant driving a vehicle reading "A-1 Bail Bonds" to Lee County Magistrate Court on September 7, 2011 while conducting business. Photographic evidence (Exh. 4) confirms that Claimant had a decal on the back of her personal vehicle advertising "A-1 Bail Bonds 756-1500 24HRS!!" On September 8, 2011, Claimant was observed shopping at Wal-Mart and squatting repetitively to look at items on low shelves. (Exh. 3). Claimant's Facebook page from September 19, 2011 also notes her as "Self Employed and Loving It!" She lists herself as a professional bondsman and notes "bond you out of jail if you need me call me." (Tr. 37, lines 11-24) (Exh. 7).

Pointedly, at her deposition, Claimant claimed that she had not worked since her prior deposition in 2009, but at the Hearing she admitted that that was a false response. (Tr. 53, lines 9-12). She also testified at her deposition that she had no further education or certification since the date of injury; however, at the Hearing she admitted both that she received certification as a bail bondsman in August 2010, and that she received a diploma in accounting in 2010. (Tr. 50, line 13 – 51, line 25) (Tr. 53, lines 9-16) (Exh. 5).

Claimant would have this Court believe a fairly incredible version of events: that despite

being written out of work for part of the time by Dr. Wolgin, she worked for ABC Bail Bonds and ASAP Towing for six months before quitting because the work was too hard and she was in too much pain to continue. Then, in spite of all of the intense pain from ABC Bail Bonds job, she immediately started working for A-1 Bail Bonds and volunteered to perform the exact same work for ***free***. (Tr. 28, line 16 – 31, line 5). Despite the pain she alleged she was in, she was doing a job for free that she helped hire and train Mary Weaver to do for pay. (Tr. 34, line 15 – 35, line 14). Claimant put a large decal across the back of her personal vehicle promoting her new employer. (Exh. 4). Her Facebook page promotes her employment as a bail bondsman. (Tr. 37, lines 11-24) (Exh. 7).[20] Nonetheless, she now claims that she was just trying to help a friend with back problems and with a failing business and truly is permanently and totally disabled.

This argument makes no sense on many levels. First, if the pain was so severe she had to quit ABC Bail Bonds, she would not likely seek immediate work for another company doing the exact same job. Second, if she did fight through the pain to work for another company, it is completely illogical and unbelievable that she would do this work for free. Third, Claimant actively advertised her services on the back of her personal car and on her Facebook page. Fourth, she helped recruit and train another individual to do the same job for A-1 Bail Bond for pay that she alleges she was doing for free. Fifth, she was observed performing bonds for A-1 Bail Bond. (Tr. 79, line 15 – 81, line 18).

The Commission did not buy her fabrications and neither should this Court.

The fact that the Commission did not believe Claimant's concocted story does not mean its Decision is based on any alleged *ex parte* communication or that it is not supported by

[20] Claimant claims that she simply spent a lot of time on Facebook playing games in order to pass the hours. If that was the case, she admits that she frequently visited her Facebook page which would have given her ample and

substantial evidence in the record, as Claimant argues. Claimant opines that, "It defies common sense to hold a failed work attempt against an injured worker." (App. Br. p. 25). That is not what occurred here; instead, Claimant is being held accountable for attempting to claim permanent and total disability award when she was lying about her ability to work. In addition, Mann v. Travelers' Ins. Co., 176 S.C. 198, 179 S.E. 796 (1935), relied on by Claimant for this point, is inapplicable, because it involved a claim against an accidental insurance policy and not a workers' compensation claim. Furthermore, the plaintiff in Mann proved he attempted but was unable to return to his regular work. 176 S.C. at 204, 179 S.E. at 798 (the evidence showed "plaintiff was never able to do his work after the accident, but only parts of it, and that the permanency of his disability became so apparent that he was finally discharged"). Here, Claimant failed to prove she was unable to continue working or, in fact, that she was not actively working at the time of the Hearing.

Although Claimant cites various cases for the proposition that an impairment rating is not necessarily the same as a disability award, which Respondents do not dispute, the Commission did not mechanically adopt Dr. Wolgin's impairment rating as Claimant's disability award. Instead, the Commission awarded a slightly higher disability award than Claimant's impairment rating. (APA 2 p. 76) (Commission Decision pp. 10, 13). Furthermore, simply because the Commission has made disability awards that are higher than a claimant's impairment rating in other cases with other facts, (App. Br. pp. 30-31), does not mean the facts in this case warrant a higher disability rating than 40%. For example, in Linen v. Ruscon Constr. Co., 286 S.C. 67, 69, 332 S.E.2d 211, 212 (1985), Lyles v. Quantum Chem. Co., 315 S.C. 440, 445, 434 S.E.2d 292, 295 (Ct. App. 1993), and Cropf v. Pantry, Inc., 289 S.C. 106, 108, 344 S.E.2d 879, 880 (Ct. App. 1986), the appellate court upheld the Commission's factual determination

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repeated opportunity to correct her claim to be "self-employed and loving it!" (Tr. 37, lines 11-24) (Exh. 7).

regarding claimant's disability award based, at least in part, on the credible testimony of the claimant. Here, in contrast, Claimant asks this Court to overturn the Commission and find her permanently and totally disabled, despite the fact that such a finding rests on her credibility as a witness, and she was not credible.

Claimant's suggestion that the Commission Decision was based on "rank speculation" is unavailing. The case she points to, Hutson v. South Carolina State Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012), addressed a situation where the Commission based its determination that the claimant was not permanently and totally disabled solely on the claimant's statements that he was interested in opening and running a restaurant, even though he admittedly had never run a restaurant previously and did not know what all it entailed. The single commissioner noted that, had the claimant not made that statement, he "would have found him to be Permanently and Totally disabled under 42-9-10." 399 S.C. at 385-386, 732 S.E.2d at 501-502. The Court did not make its own credibility determination; instead, it found that the Commission's decision, supported only by the claimant's hopes of running a restaurant, was based on "rank speculation" that did not support the decision. 399 S.C. at 389, 732 S.E.2d at 504.

Finally, Claimant argues that, in reality, she was awarded only a 29.2% disability rating because of the credit allowed to Respondents for TTD paid from the time she reached MMI, February 14, 2011, to the date of the hearing, September 27, 2011. (App. Br. pp. 22, 31). When a claimant reaches MMI, she is no longer entitled to temporary total benefits. Curiel v. Environmental Mgmt Servs, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) (explaining that, "the date of maximum medical improvement signals the end of entitlement to temporary total benefits"). Furthermore, the credit to Respondents was based, part, on the fact that the Court found she was working during this time. (Commission Decision, pp. 8-9). In order to reach any

other conclusion, this Court would have to overturn both the Commission's credibility and factual determinations, not to mention buy into Claimant's fabricated and unbelievable story about volunteering to do for free a job that she claims she could not stand to do for pay. Claimant told Dr. Wolgin she wanted to "go ahead and close her case," which is why Dr. Wolgin declared her at MMI on that date. She cannot now complain that, despite the fact she is at MMI, she should have continued to receive TTD.

B. Claimant is not entitled to permanent and total disability under Section 42-9-10.

Claimant asserts she is entitled to permanent and total disability under Section 42-9-10. In fact, Claimant is fortunate that the Commission awarded her disability for a scheduled member under Section 42-9-30 because, under Section 42-9-10, she would have had to have proven disability. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 105-107, 580 S.E.2d 100, 102-103 (2003) (explaining that, under Section 42-9-10, a claimant must prove loss of earning capacity, whereas under Section 42-9-30, loss of earning capacity is presumed). Under Section 42-9-10, Claimant would have had to prove her loss of earning capacity. "Disability in compensation cases is to be measured by loss of earning capacity." Wynn v. Peoples Nat. Gas Co., 238 S.C. 1, 11, 118 S.E.2d 812, 817 (1961). Here, Claimant did not prove that she had suffered a loss of wages and lied repeatedly not only about her ability to work but also about her actual employment.

Claimant asserts that the Commission applied an incorrect test and simply concluded, "I think she can work." (App. Br. p. 27). What she fails to acknowledge is that Finding of Fact No. 18 summarizes the preceding Findings of Fact, and concludes "Based on [Mr. McGowan's] testimony and the Claimant's I find Claimant did work for A1 Bail Bonding and provided an inaccurate account to her vocational assessor regarding the length of time she was employed with

ABC, the amount she was paid per hour, and the amount of hours she was able to work." (Commission Decision p. 8).

In her Brief, Claimant relies on Colvin v. DuPont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955) for the proposition that, because she did not make very much money working for ABC Bail Bonds, she was able to prove she is totally disabled. First, the precise amount of money she made working for ABC Bail Bonds was unknown, as she was paid in cash per her request. (Tr. 49, lines 13-22) (Tr. 78, lines 126-23). Her wages were estimated at the low end of what the evidence supported, (*see* Tr. 23, line 24 – 24, line 25), as she worked up to 35 and even over 40 hours per week sometimes. (Tr. 79, lines 5-14) (Tr. 57, lines 5-10). Second, Claimant's situation is substantially different from that of the claimant in Colvin, who had limited education and was unskilled. In contrast, Claimant had earned her G.E.D. as well as an Associates' Degree in Business Management. (Tr. 16, line 16 – 17, line 7). She also was a certified bail bondsman. (Tr. 74, line 22 – 76, line 17) (Tr. 50, line 13 – 51, line 5). Her situation is similarly distinguishable from that of the claimants in Eaddy v. Smurfit-Stone Cont. Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003) (although the claimant had one year of college education and had worked one year as a bank teller, that experience was over 30 years prior to his injury; the fact that he had worked for Smurfit-Stone for 35 years performing heavy labor was significant); McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989) (the claimant was a fifty year old man with a seventh grade education who had worked for Singer for nearly 30 years performing hard physical labor); and Stephenson v. Rice Servs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) (competent and substantial evidence proved that the claimant, who suffered from PTSD, could only function within an extremely narrow niche in the labor market and that he was "basically unemployable" even prior to his back injury).

Simply put, Claimant failed to carry her burden of proving she is unable to work. As noted above, all of the evidence in the case that she alleges supports a finding of permanent and total disability rested on her credibility (her testimony, as well as the conclusions by Dr. Wolgin[21] and Mr. Adams that she was unable to work). She clearly lied to Dr. Wolgin about how much she was working and what physical functions she could perform. She also misinformed Mr. Adams during her phone interview with him regarding how much she had worked and what she could do. Given the Commission's determination that she was not credible, other evidence, including Dr. Wolgin's and Mr. Adams' conclusions that were based on her statements to them, lost any probative weight. In short, there simply is no credible evidence in the record that she is unable to work. The Commission did not apply an incorrect test – it simply did not believe her unbelievable protestations that she could not and was not working.

This Court should rule that the Commission's disability award is supported by substantial evidence and dismiss Claimant's challenge to this finding.

III. The Commission's credibility determination was proper.

Claimant asserts that the Commission's credibility determination was the result of bias resulting from allegations of a fraud investigation, and arising out of the alleged *ex parte* communication. As noted above, there was no *ex parte* communication. Furthermore, the fraud investigation was not a main issue in this case. There is no mention of fraud or the fraud investigation in the Commission's findings of facts or conclusions of law. At oral argument, Claimant's counsel conceded the same. (Comm'n Tr. 39, lines 11-22).

Furthermore, although Claimant cites Hutson for the proposition that this Court can make

[21] As noted above, the fact that Dr. Wolgin wrote Claimant out of work on February 14, 2011 losses its significance when viewed in context. Dr. Wolgin had been writing Claimant out of work during months when she was admittedly working. (APA 2 pp. 67, 70 (out of work notes from Dr. Wolgin for November and December 2010)) (Tr. 27, line 25 – 28, line 3 (Claimant did not quit working for ABC Bail Bonds in January 2011)).

credibility determinations, (App. Br. p. 32), that is not what Hutson holds. As noted above, in Hutson, the Court held that a speculative statement by a claimant that he planned to run a restaurant, absent more, was insufficient to support a finding that he was not permanently and totally disabled, particularly where the single commissioner identified that statement as the sole reason for his decision. The Court did not find the claimant's testimony lacked credibility but, instead, found that it was speculative. 399 S.C. at 385-386 & 389 732 S.E.2d at 501-502 & 504. The finding in Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012), does not advance Claimant's argument in this case either. In Cranford, this Court's statement regarding a doctor's medical report was in response to an argument made on appeal by the employer, and was not in any way commenting on a credibility determination made by the Commission. In fact, in Cranford, this Court acknowledged the conflicting evidence in the record and, explaining that the Commission has the discretion to weigh the conflicting evidence, deferred to the Commission's factual findings. 399 S.C. at 80, 731 S.E.2d at 311.

Finally, Claimant cites dicta from a dissent in a North Carolina case from 1940, Stallcup v. Carolina Wood Turning Co., 217 N.C. 302, 7 S.E.2d 550 (N.C. 1940), for support of her arguments regarding the Commission's credibility determination. Even allowing for the fact that this is dicta in a dissent, a major distinction between this case and Stallcup is that, in Stallcup, the facts were not in dispute. 217 N.C. 307, 7 S.E.2d at 552. Here, the facts are sharply in dispute and the Commission's findings are supported by substantial evidence in the record. Our courts have long held that, "[w]here there is a conflict in the evidence, the Commission's findings of fact are conclusive," and "[t]he final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; *see also*

Watt v. Piedmont Automotive, 384 S.C. 203, 211-12, 681 S.E.2d 615, 619-20 (Ct. App. 2009) (this Court held that it could not question the credibility determination of the Commission even where other testimony in the record conflicted with the employer's version of events).

Claimant's attempt to create error where there is none should be rejected. As noted above, none of the Commission's findings regarding Claimant's credibility were based the fraud investigation. Claimant's protestation that she "never hid anything from anybody," (App. Br. p. 33), is belied by the record in this case. Some lies even she cannot attempt to cover at this point. (*See* App. Br. p. 34, n.11 (acknowledging that she lied during her deposition about whether she "had earned any money since some point in time")) (Tr. 49, line 6 – 50, line 12) (Tr. 53, lines 9-12). She was not "exceptionally forthcoming" about the work she performed for Mr. Owens. Instead, when backed into a corner, she concocted the illogical argument that she did not consider what she did for him "work" because he allegedly did not pay her – even though it was precisely the same work she had done for ABC Bail Bonds for pay. (Tr. Tr. 48, line 21 -9) (Tr. 60, lines 5-25) (Tr. 64, lines 2-10).

Claimant suggests this Court should look at what she actually did. Respondents concur. The record demonstrates that she repeatedly lied until she was backed into a corner, at which point she either admitted her deception or concocted an implausible story. She worked for ABC Bail Bonds but requested to be paid "under the table," (Tr. 49, lines 10-22), which conveniently resulted in no record of how much she worked and/or how much she made. (*See* Tr. 23, line 24 – 24, line 25). She quit that job, ostensibly because she was in so much pain she could not continue, and then turned around and began doing the exact same job for free, just to help out a friend. (Tr. 64, lines 2-10). And this is during the time when she had a young child at home to care for as well, (APA 2 p. 76), making her tale even more unbelievable. Other credible

testimony in the record indicates she was working during this time. (Tr. 79, line 15 – 80, line 6).

This Court should uphold the Commission's determination that Claimant was not a credible witness.

IV. The Commission properly determined Claimant is not entitled to ongoing medical treatment.

Claimant objects to the fact that, with respect to ongoing medical care, the Commission only ordered Respondents to "furnish any prosthetic devices during the life of the Claimant or for so long as such devices are necessary." (Commission Decision pp. 13-14).

Claimant argues she is entitled to ongoing medical treatment based on Dr. Wolgin's notes. However, on December 21, 2010, Dr. Wolgin merely mentioned, "we also discussed dorsal column stimulator as a treatment option." There was no recommendation. At that point, he was waiting to see the results of a lumbar CT scan, which was scheduled for the following month. (APA 2 p. 70). In February 2011, Dr. Wolgin mentioned she might be "a surgical candidate if she wanted to do an open revision of the L4 through S1 fusion," but did not recommend any future surgery to a reasonable degree of medical certainty. He also noted she simply felt she was "not able to consider surgery as a valid option at this time and she chose to go ahead with closing her case." Although he suggested she might want to consider "future care," she was to return to him only on an "as-needed basis." (APA 2 p. 76).

At the hearing, Claimant did not testify that she was seeking any additional medical treatment. In fact, the only testimony was that she did not want to undergo a second surgery. (Tr. 20, line 14-22).

The Commission exercises broad discretion under S.C. Code Ann. § 42-15-60 to order appropriate medical treatment, or to deny it where the facts do not warrant. The Commission appropriately included only lifetime repair and replacement of Claimant's hardware from the

fusion surgery. The record supports the Commission's finding and should be upheld.

V. The Commission properly excluded the testimony of Tony Owens.

The Commission has wide latitude in deciding what evidence should be admitted and what evidence should be excluded. *See* McGaha v. Mosley, 283 S.C. 268, 275-276, 322 S.E.2d 461, 465-466 (Ct. App. 1984) (instructing that the admission of testimony is "within the sound discretion of the trial judge and his decision will not be disturbed on appeal absent a showing of abuse of discretion"); *cf.* Brown v. La France Indus., 286 S.C. 319, 325, 333 S.E.2d 348, 351 (Ct. App. 1985) (single commissioner "enjoys considerable latitude and discretion in these matters"). Within its discretion, the court in McGaha allowed a rebuttal witness to testify who had not been previously noticed. 283 S.C. at 276, 322 S.E.2d at 466. Here, Claimant called her late-noticed witness, Mr. Owens, as part of her direct case, immediately at the close of her testimony. (Tr. 64, line 11 – 66, line 15). The Commission properly granted Respondents' motion to exclude Mr. Owens' testimony because he had not been timely identified as a witness.

Claimant relies on Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997. The holding in Smith v. SDCMH, however, was limited to "the particular circumstances of this case..." 329 S.C. at 497, 494 S.E.2d at 636. Several key distinctions between the instant case and Smith v. SDCMH render it inapplicable here. First, in Smith, there was no indication that any of the witnesses who were not allowed to testify had not been properly and timely noticed. Thus, there was absolutely no justification for the exclusion of the witnesses. Second, in Smith v. SDCMH, after two hours of testimony, the single commissioner simply and arbitrarily refused to allow any additional witnesses to testify. He merely stated that much of the testimony that had been elicited had been "irrelevant or immaterial..." Id. Third, because the claimant himself apparently had not yet testified, the

single commissioner then proceeded to question the claimant but did not allow either the claimant's counsel or defense counsel to ask any questions. Id. Finally, the medical evidence the single commissioner did rely on was over two years old at the time of the hearing. Smith v. SDCMH, 329 S.C. at 499, 494 S.E.2d at 637. Here, by way of contrast, the only witness who was excluded was not timely noticed, with no good excuse as to why he had not been timely noticed.[22] All of the properly noticed witnesses were allowed to fully and completely testify, and there was no indication that the evidence put forth at the hearing was irrelevant or immaterial. In addition, Claimant was allowed to testify fully, with proper direct, cross and re-direct examination by counsel for both sides. Finally, the testimony and evidence in this case was recent, and not out of date.

Regulation 67-611 binds each party to notify the opposing party of "witnesses concerning the facts of the case" at least ten days before the hearing. S.C. Code Reg. § 67-611. This regulation does not provide the Commission with discretion to waive the ten-day notice requirement for witnesses. *See* Gadson v. Mikasa Corp., 368 S.C. 214, 226-227, 628 S.E.2d 262, 269 (Ct. App. 2006) (and noting that, "[r]egulations authorized by the legislature have the force of law"). Claimant admits that she did not notify Respondents of her intention to have Mr. Owens testify until seven days prior to the Hearing. (Tr. 66, lines 12-15).

Claimant argues that this regulation should not apply because Mr. Owens would have been in response to Mr. McGowan's testimony. First, although Claimant insists that Mr. Owens was a rebuttal witness, (App. Br. p. 36), Mr. Owens was offered as part of Claimant's direct case.

[22] Claimant's excuse that she did not know she would need to bolster her own credibility reveals the weak link in her argument. As noted above, the claimant always bears the burden of proving she is entitled to workers compensation benefits and should be prepared to submit all her evidence in her case in chief. S.C. Code Reg. § 67-613 ("[e]ach party shall arrange and present all evidence at the hearing").

(Tr. 66, line 19 – 67, line 16).[23] This is not rebuttal testimony. Second, it is important to note that the Respondents' Form 58 was timely filed and the Claimant had ample opportunity to withdraw her Form 50 if she was not prepared to proceed with the Hearing pursuant to S.C. Code Reg. § 67-609.

Furthermore, Claimant could have made a Motion to Postpone the Hearing in order to take deposition testimony of Mr. McGowan if she believed there were compelling reasons to postpone the Hearing. S.C. Code Reg. § 67-613. Claimant failed to take this action. Alternatively at the Hearing, Claimant could have made a motion to take this testimony prior to the commencement of the Hearing but chose not to. Even if a pre-hearing motion were denied, Claimant still could have withdrawn her Form 50 just before the Hearing commenced under S.C. Code Reg. § 67-609 and Spruill v. Richland County Sch. Dist. 2, 363 S.C. 61, 609 S.E.2d 524 (2005).

Claimant relies on Morgan v. JPS Automotives, 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996) for the proposition that it is error to exclude a properly noticed witness. However, her reliance on Morgan is entirely misplaced because the issue here is that Mr. Owens was **not** properly and timely noticed. Furthermore, what Claimant fails to note is that the claimant in Morgan filed a petition to adjourn the hearing so that additional, relevant evidence could be procured. 321 S.C. at 203-204, 467 S.C.2d at 459. That is precisely what Claimant could have, but did not do here.

As noted above, the Commission's Regulations do not grant the Commission the discretion to waive the notice requirement and proceed with a Hearing with improperly noticed

[23] Regardless of whether Claimant believed she could "anticipate" Mr. McGowan's testimony, the fact is that she offered Mr. Owens' testimony as part of her direct case. Furthermore, regardless of the Hearing Commissioner's comments regarding time, the fact is that his decision is upheld by the fact that Mr. Owens was a late-noticed witness offered in Claimant's case-in-chief and was, therefore, properly excluded.

witnesses. Despite multiple opportunities, Claimant did not withdraw her Form 50 Request for Hearing; therefore, Claimant does not now have the right to include this testimony in the record.

Claimant's inaction is not the fault of the Respondents. Despite this, she argues that she should be allowed to introduce improperly noticed testimony of her witness. Admission of this testimony would have unfairly prejudiced Respondents, who did not have an opportunity to properly investigate or depose Mr. Owens in advance of the Hearing. Furthermore, to the extent Claimant attempts to justify her late designation of Mr. Owens on the existence of an ex parte communication, (App. Br. p. 35-36), her argument fails because there was no *ex parte* communication.

In the end, however, even if Mr. Owens had been allowed to testify, his testimony would not have changed the outcome of this case. Even Claimant appears to admit that now. (App. Br. p. 37). The Commission's credibility determination was based on a myriad of considerations, such as her lying about not having worked at all since her back surgery, and later admitting she had; Claimant's statement that she had not obtained any additional education, training or certificates since her surgery and her later admitting that she had; and Claimant's insistence that she could not bend, stoop, or pick things off the floor, which was belied by surveillance tape of her doing exactly that; Claimant's incredible and concocted story about quitting one job because it was too painful and then immediately performing the same job for a friend for free. Nothing Mr. Owens could have said would affect the Commission's credibility determination based on these facts. Therefore, it is absurd to think that, having Mr. Owens join in her incredible story about how she worked for him for free, doing the same work she had previously done for pay but could not longer do because of extreme pain, would have changed the Commission's decision.

The Commission's decision to exclude the proffered testimony of Mr. Owens was proper

and should be upheld.

CONCLUSION

For all the reasons stated herein, this Court should uphold the Commission Decision in its entirety and dismiss Claimant's appeal. In the alternative, in the event this Court finds any reversible error in the Commission Decision, which Respondents deny, this case should be remanded to the Commission, and not to the circuit court or a former or deputy commissioner, for resolution of any remanded issues.

Respectfully submitted,

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